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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 158 51627 Office: VERMONT SERVICE CENTER Date: MAR 31 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscaper/gardener. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on February 4, 1997, approved by the Department of Labor September, 20, 1999. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.[1]

On appeal, counsel submitted a brief statement in support of the appeal, and additional evidence in the form of a brief memorandum listing the current personal account balances of Achille and Catherine Abate as of November 16, 2001.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on February 4, 1997. The proffered wage as stated on the Form ETA 750 is $16.01 per hour, which equals $33,300.80 per year.

With the petition, counsel submitted two letters from Abate Landscaping relating to the job offer and to the beneficiary's experience with a former employer; Form 1120 Corporate Tax Return for Achille Abate Landscaping, Inc., the petitioner; and a memorandum from Chase Manhattan Bank providing information regarding Achille and Catherine Abate's personal bank account balances as of March 7, 2001.

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[1] This appeal relates to the director's decision dated April 1, 2002. Although the file contains a decision dated January 31, 2001, related to file EAC 00 101 52167, and involving the same petitioner and beneficiary, it does not appear that petitioner pursued an appeal from that denial.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on September 18, 2001, requested additional evidence pertinent to that ability. Specifically, the Service Center requested information demonstrating that the beneficiary possessed the required two years of experience as a landscaper/gardener. The Service Center also requested evidence to establish that the petitioner had the ability to pay the wage/salary of $16.01 per hour ($33.300.80 per year) as of February 4, 1997. The Service Center noted that the corporate tax return submitted showed a net income if $24,794, and noted that the personal bank statements may not be considered.

In response, the counsel again submitted the 1997 Form 1120 Corporate Income Tax Return, a letter from petitioner's bookkeeper listing selected financial data for tax years 1998 through 2000 and asserting that the business was a profitable enterprise and had the present ability to pay an annual salary of $34,000 to $38,000. Also included was an updated memorandum from Chase Manhattan Bank listing the personal account balances of Achille and Catherine Abate as of November 16, 2001. On the issue of the beneficiary's experience, counsel submitted a letter from beneficiary's former employer, relating his experience, and a letter from petitioner asserting that petitioner's position was not a new position, that he employed day laborers, and that Mr. Ramirez earned $30,000 and would be placed on the payroll once he obtained employment authorization.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on April 1, 2002, denied the petition.

On appeal, counsel asserts that the director miscalculated the liabilities from the 1997 tax return. Counsel asserts that the total assets were $19,118 and that the liabilities of $8,547 should be deducted from this figure for a total of $10,571 in assets. Counsel argues that this figure should then be added to the net income of $24,794 to achieve a total of $35,365 in disposable income to pay the prevailing wage. Further, counsel asserts that petitioner should be able to count Achille Abate's personal assets and therefore could avail himself of an additional $65,000 to invest in the business in order to pay the wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, formerly INS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

Counsel has provided no authority in support of the assertion that the net income should be supplemented by adding the value of assets. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even assuming that petitioner's counsel was correct that the net income figure could be supplemented by adding to it amounts related to petitioner's assets, counsel has erroneously calculated the figure for petitioner's assets versus liabilities. End-of-year net current assets are the taxpayer's end-of-year current assets, shown on Schedule L at lines 1(d), 2b(d), and 3(d), less the taxpayer's end-of-year current liabilities, shown on Schedule L at lines 16(d), 17(d), and 18(d). Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. Current liabilities are liabilities due to be paid within a year. Thus, if the net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. The figure for petitioner's net current assets does not assist petitioner, as that figure would be $1,694 less $8,547, or ($7,147). If counsel's assertion were accepted, such figure, when added to the net income would result in a total of $17,647 available to pay the beneficiary—well below the proffered salary of $33,300.80.

We now address counsel's submission of the bank's letters relating to Achille and Catherine Abate's personal account balances, and assertion that such accounts must be considered in determining petitioner's ability to pay. Counsel has provided no authority in support of this assertion. Moreover, authority exists that such are not within the scope of documents to be considered. *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass, Sept. 18, 2003). In *Sitar*, the court was faced with a similar argument, wherein petitioner argued that the personal assets of a "director" should be considered in determining the ability to pay the proffered wage. As the court noted,

> Petitioner fails to adequately counter Respondent's main argument on this issue: that nothing in the governing regulation, 8 C.F.R. § 204.5 permits the INS to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. Absent a legal obligation by Singh, the INS had no need to determine whether his income was sufficient to pay Avtar's salary...At bottom, Petitioner has not submitted evidence of its own ability to pay the proffered wage. Accordingly, the court cannot say that the INS's decision to restrict itself to an examination of assets under Petitioner's legal control was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Id.

The petitioner's counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 1997. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

In addition, the record reflects that evidence of petitioner's ability to pay the proffered wage focuses exclusively on the 1997 tax year. No tax records were submitted for any other year besides 1997 despite the fact that the petitioner must demonstrate the ability to pay from the priority date through the date the beneficiary obtains permanent residence. In this case, the petition was filed in April 2001 and the appeal was taken in May 2002.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.